MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM

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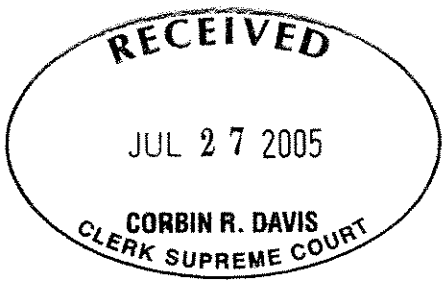
ADMINISTRATOR



July 26, 2005

The Michigan Supreme Court
Clerk's Office
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2003-04
Proposed Amendment of MCR 7.205

Dear Mr. Chief Justice and Associate Justices:

I am writing on behalf of the Michigan Appellate Assigned Counsel System (MAACS) and its roster of attorneys in opposition to the proposed amendment of MCR 7.205. The proposed six-month deadline for filing applications for leave to appeal trial- and plea-based convictions and/or sentences will work hardships on MAACS roster lawyers and their clients in disproportion to the perceived benefits of the proposed amendment.

Applications for Leave to Appeal Trial-Based Convictions

It will be in this category of appellate cases in which the proposed amendment will have the greatest impact on the lawyers who provide assigned representation and on their clients. Indigent defendants fail to timely request the appointment of appellate counsel for myriad reasons, but rarely, if ever, does the reason involve the careful consideration, for a period in excess of 42 days, of one's legal options. I will not catalogue the numerous other reasons–which include, by brief example, the prevalence of illiteracy in this population or the loss of personal property which routinely accompanies the multiple residence transfers experienced by incarcerated defendants during this first six weeks after sentencing–which result in defendant's who have been convicted of serious offenses after often lengthy jury or waiver trials, to lose their appeal by right. However, this is surprisingly common. In these instances, and if all appropriate procedures are followed, without hitch, the chronology of events would ordinarily look like this example:

January 1 The defendant is sentenced after a three-day trial conviction. The proposed six-month deadline clock begins to run.

February 12 (Day 43) The defendant files an untimely request for appellate counsel.

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February 26 The trial court appoints counsel on appeal. Appellate counsel receives a copy of the order, the register of actions and the judgment of sentence. The order, of course, also directs the reporter(s) to prepare the trial and sentencing transcripts. Since this case involves a trial, the reporter is usually given 91 days to prepare the transcripts(s), per MCR 7.210(B)(3)(b)(iv).

May 28 The reporter files the trial and sentencing transcripts. Because this is already within 42 days of the six-month appellate deadline, the 42-day exception in 7.205(F)(4) applies.

June 30 The "normal" six-month deadline for filing the application for leave to appeal expires.

July 9 The extended deadline, pursuant to the exception, expires.

This chronology reflects that it will be almost always true that appellate assigned counsel will have but 42 days to file the application for leave to appeal after the transcripts have been filed in cases such as these. The proposed amendment places appellate assigned counsel and their clients in leave cases in an unreasonably disadvantageous representational position in comparison to counsel who provides appointed representation in a claim case.

The only difference, of course, between an indigent defendant's appeal of a conviction by leave or by claim is the timing of this defendant's request for the appointment of counsel. The trial–the representation provided and the possible legal errors which occurred during it and any pretrial hearings conducted–is not changed by the defendant's late request for counsel. Nevertheless, appellate assigned counsel will routinely have, at minimum 14 days, and at maximum 74 days, less time within which to file the required "pleading"in a trial-based leave case than is available to counsel assigned to represent a defendant in an appeal by right. This is true though the amount of professional ability and knowledge required of counsel is the same. This is true though the same adherence to the Minimum Standards for Indigent Criminal Appellate Defense Services is required of counsel in a leave case as would be required in the same case on claim of appeal.

Second, the matter of the transcription of trial-based proceedings on leave to appeal may be the source of significant problems. This Court has not proposed altering the time within which reporters will be required to prepare the trial transcripts simply because the case involves an appeal by leave. Further, and as a practical matter, there is no greater guarantee that transcripts will be timely prepared in a leave case than in a claim case. However, in a claim of appeal matter, there is a procedure available to counsel to enforce the timing requirements for transcript filing. In appeals by leave, however, the Court of Appeals does not have jurisdiction to order a reporter to show cause for a late transcript. Nor does there appear to be a procedure described in the court rules for use in the trial courts to enforce the timely filing of transcripts.

Finally, the chronology outlined above is a "best-case" example. Unfortunately, this "best-case" is not always the norm. For example, while the trial courts endeavor to meet the requirement that counsel be appointed within 14 days, appointment of counsel after 14 days have elapsed continues to occur. Any delay in the appointment of counsel pushes the chronology back and further increases the likelihood that counsel will have only the 42 days provided by MCR 7.205(F)(4) within which to file an application for leave to appeal. Further, the Court did not amend, on July 13, 2005 and effective immediately, the language of now re-designated MCR 6.425(G)(1)(b). That is, the trial court's are still encouraged to "liberally grant an untimely request as long as the defendant may file an application for leave to appeal." MAACS continues to be extremely supportive of this language. It remains, however, that any delayed request for the appointment of counsel to appeal a trial-based conviction filed between days 43 and 179 will also further increase the likelihood that counsel will have only the 42 days provided by MCR 7.205(F)(4) within which to file an application for leave to appeal.

All of these examples reflect that the proposed amendment to MCR 7.205 as it applies to appeals by leave of trial-based convictions acts to impose representational burdens on appellate assigned counsel which are unnecessary, which reward haste over reflection and which create unsupportable distinctions between two types of cases where none ought to exist.

Applications for Leave to Appeal Plea-Based Convictions

I am mindful that the Court adopted, on July 13, 2005, amendments to MCR 6.310(C), 6.429(B)(3) and 6.431(A)(3). These amendments reduced, also to six months, the amount of time within which certain post-conviction motions must be filed. Two of these motions–the motion to set aside a plea of guilty and the motion to correct an invalid sentence–are required to be filed to preserve the relevant issues for review by the Court of Appeals. (Another, the motion for new trial, is required in certain circumstances to be filed to preserve a particular issue.) I will address a possible procedural difficulty raised by these amendments, effective January 1, 2006, below. They are considered here because it is generally true that appeals of plea-based convictions most often involve issues regarding the legality of the plea itself, or, and considerably more frequently, the correction of an arguably invalid sentence.

MAACS does not see the necessity for reducing the deadline for filing an application for leave to appeal to raise these types of issues. First, MAACS is unaware that the Court of Appeals is particularly burdened by applications for leave to appeal plea-based convictions. Indeed, it is this agency's impression that these types of case comprise a very small percentage of the Court of Appeals' docket. The number of these cases will certainly increase in response to *Halbert v Michigan*, 545 US___, 2005; WL1469183 (June 23, 2005). However, it is this agency's best guess that this increase, based on the historical practice of many of the Circuits prior to *Halbert* and other factors, will be in the vicinity of 250 cases per year and might be considerably lower.

Much of the post-conviction representation in these plea cases occurs in the trial courts. With all

due respect to the Court of Appeals, the circuits are extremely busy as well. Motions for post-conviction relief in the trial courts are quite frequently adjourned, for reasons which are completely legitimate and often based on necessities imposed by the crowded nature of the "criminal docket." For example, it takes but one mis-communication in a series of necessary communications between a circuit, a county jail and the Department of Corrections to insure that the defendant is not transferred from his prison residence for the hearing, requiring that the matter be adjourned. With any or each adjournment in the trial court, the deadline for filing an application for leave to appeal comes closer. I am unaware of any current or proposed court rule which imposes or would impose a requirement that, as an example, a filed motion to correct an invalid sentence must be decided by the trial court within a certain period of time, or which describes particular relief should the motion not be resolved in that period of time. Thus, if the decision on the motion to correct an invalid sentence is not entered before, roughly, 5 months and 10 days after sentencing, it is the defendant and appellate assigned counsel who will bear the burden of being required to file an application for leave to appeal an unsuccessful motion, and within only 21 days, resulting from trial court adjournment(s) of such motions.

Further, and somewhat along these same lines, the just-described example seems likely to occur with even more frequency now that the time for filing these specific post-conviction motions has been reduced. It is not clear how this positively impacts the Court of Appeals. Had none of the amended deadlines been approved, and if the deadline proposed in 7.205 is not, the trial courts would continue to have an additional six months to resolve issues which must be raised in the trial courts, in any event, in order to preserve them. Much of this post-conviction litigation in plea cases is outcome-determinative. For example, a successful motion for correction of an invalid sentence, either because the statutory guidelines were improperly scored or the presentence information report contained unnoticed incorrect information often completely eliminates the need for any involvement by the Court of Appeals. MAACS does not see the necessity for or the benefit of the proposed amendment of MCR 7.205 to the courts, and sees significant burdens imposed on the roster of lawyers who provide this representation and on the clients these lawyers serve.

As noted above, this Court adopted, on July 13, 2005, amendments to MCR 6.310(C), 6.429(B)(3) and 6.431(A)(3). Court of Appeals Chief Clerk, Sandra Mengel, pointed out to this Court in her letter regarding this Administrative file, dated June 4, 2004 and concerning all of these specific rules, that if MCR 7.205 is not amended as proposed, it will "create a time period in which defendant cannot proceed in the trial court, but the issues cannot be raised in the Court of Appeals. This period would extend from 6 months 1 day to 12 months after sentencing . . ."

However, I urge the Court to resolve this problem not by approving the proposed amendment to MCR 7.205, but rather by reconsideration of the Court's adoption of the amendments to MCR 6.310(C), 6.429(B)(3) and 6.431(A)(3). Because the issues governed by these rules must already be raised first in the trial court, no additional burden has been or would be imposed on the circuits. Recognizing, however, that the obligation to address these post-conviction issues has

previously imposed a burden on the trial courts, allowing them the formerly available six months to resolve them continues to seem appropriate . This is particularly so, given that the resolution of these issues by the trial courts will so frequently eliminate any necessity for involvement by the Court of Appeals.

For all of the reasons outlined above, I urge the Court to reject the proposed amendment to MCR 7.205. I also urge your consideration of withdrawal of the approved amendments to MCR 6.310(C), 6.429(B)(3) and 6.431(A)(3).

Sincerely,

Thomas M. Harp
Administrator